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UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Ex parte JUSTIN E. ROGERS, NATHAN J.E. FURTWANGLER,
VENKATRAMAN V. KUDALLUR, EVGENY N. VESELOV,
AMRITAM SARCAR, and CHRISTIAN STOCKWELL

Appeal 2016-005305
Application 13/655,379¹
Technology Center 2100

Before ROBERT E. NAPPI, ST. JOHN COURTENAY III, and
SCOTT B. HOWARD, *Administrative Patent Judges*.

HOWARD, *Administrative Patent Judge*.

DECISION ON APPEAL

Appellants appeal under 35 U.S.C. § 134(a) from the Non-Final Rejection of claims 1–20, which constitute all of the claims pending in this application. We have jurisdiction under 35 U.S.C. § 6(b). *See Ex parte Lemoine*, 46 USPQ2d 1420, 1423 (BPAI 1994) (precedential).

We affirm.

¹ Appellants identify Microsoft Corporation as the real party in interest. App. Br. 3.

THE INVENTION

The disclosed and claimed invention is directed to “utilizing the display refresh notifications to drive layout processing within a web browser's layout pipeline.” Abstract.

Claim 1, reproduced below, is representative of the claimed subject matter:

1. One or more computer readable storage memories embodying computer readable instructions which, when executed, implement a web platform comprising:

a layout pipeline comprising:

a view controller component configured to cause a refresh operation to be performed in which a device screen is refreshed in part by issuing a refresh notification within the layout pipeline; and

a layout component configured to perform layout processing sufficient to enable web content to be rendered on the device screen, the layout component being configured to delay the layout processing until the refresh notification is received from the view controller component effective to enable the device screen to be refreshed.

REFERENCES

The prior art relied upon by the Examiner as evidence in rejecting the claims on appeal is:

Alderson	US 2004/0201618 A1	Oct. 14, 2004
Gale	US 2008/0120368 A1	May 22, 2008
Liang	US 2009/0313640 A1	Dec. 17, 2009
Burckart	US 2010/0250706 A1	Sept. 30, 2010

REJECTIONS

Claims 1–20 are provisionally rejected on the ground of nonstatutory double patenting as being unpatentable over claims 1–20 of co-pending Application No. 13,229,696. Non-Final Act. 3–4.

Claims 13–16 stand rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Gale in view of Liang. Non-Final Act. 4–9.

Claims 1–7 and 17–20 stand rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Gale in view of Alderson and Burckart. Non-Final Act. 9–17.

Claims 8–12 stand rejected under pre-AIA 35 U.S.C. § 103(a) as being unpatentable over Gale in view of Alderson, Burckart, and Liang. Non-Final Act. 17–23.

ANALYSIS

We have reviewed the Examiner’s rejection in light of Appellants’ arguments that the Examiner erred. In reaching this decision, we have considered all evidence presented and all arguments made by Appellants. We are not persuaded by Appellants’ arguments regarding claims 1–20, and we incorporate herein and adopt as our own: (1) the findings and reasons set forth by the Examiner in the action from which this appeal is taken (Non-Final Act. 3–23), and (2) the reasons and rebuttals set forth in the Examiner’s Answer in response to Appellants’ arguments (Ans. 23–33). We incorporate such findings, reasons, and rebuttals herein by reference unless

otherwise noted. However, we highlight and address specific findings and arguments for emphasis as follows.²

Double Patenting Rejection

Subsequent to the filing of the Appeal Brief, Application 13/229,696—the basis of the provisional obviousness type double patenting rejection—was abandoned on October 21, 2015 for failure to respond to an office action. Therefore, we dismiss this rejection as moot.

Claims 1–7

Appellants argue the Examiner erred in rejecting claim 1 because Gale does not teach or suggest a view controller that causes a refresh operation “in part by issuing a refresh notification within the layout pipeline” or a “layout component being configured to delay the layout processing until the refresh notification is received from the view controller component effective to enable the device screen to be refreshed,” as recited in claim 1. App. Br. 25.

Nonobviousness cannot be established by attacking the references individually when the rejection is predicated upon a combination of prior art disclosures. *In re Merck & Co.*, 800 F.2d 1091, 1097 (Fed. Cir. 1986). The test for obviousness is not whether the claimed invention is expressly suggested in any one or all of the references, but whether the claimed subject

² Rather than reiterate the entirety of the arguments of Appellants and the positions of the Examiner, we refer to the Appeal Brief (filed Sept. 3, 2015); the Reply Brief (filed Apr. 22, 2016); the Non-Final Office Action (mailed Apr. 10, 2015); and the Examiner’s Answer (mailed Feb. 26, 2016) for the respective details.

matter would have been obvious to those of ordinary skill in the art in light of the *combined teachings* of those references. *In re Keller*, 642 F.2d 413, 425 (CCPA 1981). Because the Examiner relies on Alderson and Burckart for those limitations (Non-Final Act. 11–13), we are not persuaded by Appellants’ argument, which are directed to Gale, that the Examiner erred.

Appellants also argue the Examiner erred in finding Alderson teaches “the layout component being configured to delay layout processing until a refresh notification is received from the view controller component,” as recited in claim 1. App. Br. 25–26. Specifically, Appellants contend Alderson teaches storing updates in a queue which is emptied at predetermined time intervals. App. Br. 25–26. Appellants further contend that “[a]fter this occurs, the browser then updates the screen display.” App. Br. 26. According to Appellants, this does not correspond to the disputed limitation. *Id.* Appellants further argue that Alderson does not use the term “refresh notification.” *Id.*

The Examiner finds although Gale teaches a layout component, it does not teach “the layout component being configured to delay layout processing until a refresh notification is received from the view controller component.” Non-Final Act. 10–11 (emphasis omitted). The Examiner further finds Alderson teaches storing a plurality of data items and sending them as a batch for processing at a predetermined time. *Id.* at 11–12. The Examiner further finds it would have been obvious to “combine the teachings of Alderson with Gale to include the layout component being configured to delay layout processing until a refresh notification is received from the view controller component for the purpose of providing resulting in a more efficient updating procedure.” *Id.* at 12 (emphasis omitted).

Because Appellants' arguments are directed to Alderson individually and not the combination of teachings of both Alderson and Gale relied on by the Examiner, we are not persuaded that the Examiner erred. *See Merck*, 800 F.2d at 1097; *Keller*, 642 F.2d at 425.

Moreover, there is no requirement in an obviousness analysis for the prior art to "contain a description of the subject matter of the appealed claim in *ipsissimis verbis*." *In re May*, 574 F.2d 1082, 1090 (CCPA 1978). Accordingly, the absence of the phrase "refresh notification" in Alderson does not persuade us the Examiner erred.

Appellants also argue the Examiner erred in finding a reason to combine Gale and Alderson. App. Br. 26. According to Appellants, although the Examiner finds a person of ordinary skill in the art would combine the teachings in order to provide a more efficient updating procedure, the Examiner makes no findings as to why that is so. *Id.*

In the Answer, the Examiner makes additional findings regarding the reason to combine the references: "The motivation for doing so is that Alderson provides sending the data items to the browser as a batch allows the browser to perform a single updating procedure to update the screen, rather than having to repeatedly update the screen every time a single data item arrives." Ans. 24.

Appellants do not address this additional reasoning in the Reply Brief. *See* Reply Br. 2–6. Because Appellants do not address the Examiner's finding as to why a person of ordinary skill in the art would combine the references, we are not persuaded of error based on Appellants' argument that do not adequately address the rejection on appeal. Instead, we determine that Examiner's finding provides a "rational underpinning to support the

legal conclusion of obviousness.” *In re Kahn*, 441 F.3d 977, 988 (Fed. Cir. 2006), *cited with approval in KSR Int’l Co. v. Teleflex Inc.*, 550 U.S. 398, 418 (2007).

In the Reply Brief, Appellants argue the Examiner erred in finding Burckart teaches or suggests “a device screen is refreshed in part by issuing a refresh notification within the layout pipeline,” as recited in claim 1.

Reply Br. 4–5.

However, Appellants did not raise this argument in the Appeal Brief. *See* App. Br. 22–27. Instead, the only reference to Burckart was the Appellants’ statement that “[w]ith respect to the deficiencies of Gale and Alderson, Burckart is not seen to add anything of significance.” App. Br. 27. Because Appellants’ argument was presented for the first time in the reply brief, it has been waived *See* 37 C.F.R. §41.41(b)(2) .

Accordingly, we sustain the Examiner’s rejection of representative claim 1, along with the rejection of grouped dependent claims 2–7, which are not argued separately.³ *See* 37 C.F.R. § 41.37(c)(1)(iv).

³ In the event of further prosecution, including any review for allowance, because claims 1–7 are not limited to non-transitory computer readable storage, we leave it to the Examiner to consider the question of whether the claims are patent-eligible under 35 U.S.C. § 101. *See In re Nuijten*, 500 F.3d 1346, 1356–57 (Fed. Cir. 2007) (transitory embodiments are not directed to statutory subject matter); *Ex parte Mewherter*, 107 USPQ2d 1857 (PTAB 2013) (precedential); David J. Kappos, *Subject Matter Eligibility of Computer Readable Media*, 1351 Off. Gaz. Pat. & Trademark Office 212 (Feb. 23, 2010). Although the Board is authorized to reject claims under 37 C.F.R. § 41.50(b), no inference should be drawn when the Board elects not to do so. *See* MPEP § 1213.02.

Claims 8–12

Appellants argue the Examiner erred in finding Gale teaches or suggests “a refresh notification associated with refreshing a device screen,” as recited in claim 8. App. Br. 28. More specifically, Appellants argue “[t]he section cited to by the Office as teaching this feature instead discusses ‘that the first XHTML document should be refreshed’. As previously discussed, in no way does refreshing a document teach or suggest ‘refreshing a device screen’ as recited in this claim.” *Id.* (emphasis omitted).

The Examiner finds Gale teaches “receiving, from a view controller component, a refresh notification associated with refreshing a device screen.” Non-Final Act. 17 (citing Gale ¶ 42).

Our reviewing court guides that “the question under 35 USC 103 is not merely what the references expressly teach but what they would have suggested to one of ordinary skill in the art at the time the invention was made.” *Merck & Co., Inc. v. Biocraft Laboratories, Inc.*, 874 F.2d 804, 807–08 (Fed. Cir. 1989) (citation omitted). Moreover, “[e]very patent application and reference relies to some extent upon knowledge of persons skilled in the art to complement that [which is] disclosed” *In re Bode*, 550 F.2d 656, 660 (CCPA 1977) (quoting *In re Wiggins*, 488 F.2d 538, 543 (CCPA 1973)). Those persons “must be presumed to know something” about the art “apart from what the references disclose.” *In re Jacoby*, 309 F.2d 513, 516 (CCPA 1962). Additionally, the skilled artisan is “[a] person of ordinary creativity, not an automaton.” *KSR*, 550 U.S. at 421. Furthermore, as discussed earlier, there is no requirement in an obviousness analysis for the prior art to “contain a description of the subject matter of the appealed claim in *ipsissimis verbis*.” *May*, 574 F.2d at 1090.

Applying this reasoning here, we are not persuaded by Appellants' argument the Examiner erred. Gale teaches refreshing a document displayed on a screen at a specified time period. Gale ¶ 42. Therefore, we find a preponderance of the evidence supports the Examiner's finding that Gale, when combined with the other cited references, would have suggested to a person of ordinary skill in the art, receiving, from a view controller component, a refresh notification associated with refreshing a device screen.⁴

Appellants' remaining arguments regarding claim 8 are substantially identical to the arguments raised regarding claim 1. *See* App. Br. 28–30; Reply Br. 6–7. Accordingly, for the same reasons discussed above, we are not persuaded by Appellants' arguments that the Examiner erred.

Therefore, we sustain the Examiner's rejection of representative claim 8, along with the rejection of grouped dependent claims 9–12, which are not separately argued. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claims 13–16

Appellants argue the Examiner erred in finding Gale teaches or suggests “the display refresh notifications being associated with refreshing the device screen,” as recited in claim 13. App. Br. 31. Specifically, Appellants argue “Figure 2 clearly shows the requestor 225 sending the request to the server 220 which . . . in no way” teaches the disputed limitation. *Id.*

⁴ Because we find Gale paragraph 42 teaches or suggests this limitation, we need not address Appellants' arguments that the Examiner's alternate findings regarding this limitation are erroneous.

The Examiner finds Gale teaches “the web platform being configured to utilize display refresh notifications to drive layout processing within a layout pipeline of the web platform, the display refresh notification being associated with refreshing the device screen.” Non-Final Act. 5 (citing Gale ¶¶ 25–27, 42, Fig. 2); *see also* Ans. 32 (citing Gale ¶¶ 7, 20, 25–27, 42, Fig. 2).

Appellants do not address the Examiner’s findings based on the text of Gale and, instead, focus only on the teaching and suggestions associated with Figure 2. Because Appellants have not fully addressed the Examiner’s specific findings, we are not persuaded the Examiner erred. Arguments not made are waived. *See* 37 C.F.R. § 41.37(c)(1)(iv). *See also Ex parte Frye*, 94 USPQ2d 1072, 1075 (BPAI 2010) (precedential) (“the Board will not, as a general matter, unilaterally review those uncontested aspects of the rejection”). Moreover, for the reasons discussed above for claim 8—which discuss substantially the same limitation—we find that the Examiner did not err.

Additionally, in reply, Appellants argue the Examiner’s finding is insufficient because it does not use the phrase “refresh notifications to drive layout processing.” Reply Br. 9.

We find this argument unpersuasive. First, to the extent use of that phrase is relevant, that phrase is used in the findings in the Non-Final Action. *See* Non-Final Act. 5. Second, there is no requirement in an obviousness analysis for the prior art to “contain a description of the subject matter of the appealed claim in *ipsissimis verbis*.” *May*, 574 F.2d at 1090. It is therefore of no moment that the Examiner did not find the literal claim term in the prior art.

Accordingly, we sustain the Examiner's rejection of representative claim 13, along with the rejection of grouped dependent claims 14–16, which are not separately argued. *See* 37 C.F.R. § 41.37(c)(1)(iv).

Claims 17–20

With respect to rejection of dependent claims 17–20, Appellants merely assert the additional cited Alderson and Burckart references do not cure the purported shortcomings of Gale, as applied against claim 13. Appellants urge the Examiner failed to make a prima facie case of obviousness for these claims. App. Br. 32. However, we find no deficiencies with Gale, for the reasons discussed above regarding the rejection of claim 13. Because we find the rejection of claim 13 is supported by a preponderance of the evidence, for the reasons discussed above, we sustain the rejection of claims 17–20.

DECISION

We affirm the Examiner's decision rejecting claims 1–20 as unpatentable under pre-AIA 35 U.S.C. §103(a).

We dismiss as moot the Examiner's provisional obviousness-type non-statutory double patenting rejection of claims 1–20

Because we have affirmed at least one ground of rejection with respect to each claim on appeal, the Examiner's decision is affirmed. *See* 37 C.F.R. § 41.50(a)(1).

No time period for taking any subsequent action in connection with this appeal may be extended under 37 C.F.R. § 1.136(a)(1)(iv). *See* 37 C.F.R. § 41.50(f).

AFFIRMED